

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Ben S. Loeb, Inc. :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Years Ending 11/30/77 & 11/30/78. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of April, 1984, he served the within notice of Decision by certified mail upon Ben S. Loeb, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ben S. Loeb, Inc.  
1100 Milik Ave.  
Carteret, NJ 07008

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of April, 1984.

*David Parchuck*

*James J. [Signature]*

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

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the Years Ending 11/30/77 & 11/30/78. :  
AFFIDAVIT OF MAILING

State of New York }  
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of April, 1984, he served the within notice of Decision by certified mail upon Sanford Amdur, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sanford Amdur  
Amdur & Friedrich  
E 210, Route 4, P.O. Box 752  
Paramus, NJ 07652

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
6th day of April, 1984.

David Parchuck

James P. Amdur  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Ben S. Loeb, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Years Ending 11/30/77 & 11/30/78. :

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of April, 1984, he served the within notice of Decision by certified mail upon Bruce F. Minkoff, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Bruce F. Minkoff  
W. Robert Rubin & Co.  
60 E. 42nd St.  
New York, NY 10165

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
6th day of April, 1984.

*David Parchuck*

*Commie O'Donnell*  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

April 6, 1984

Ben S. Loeb, Inc.  
1100 Milik Ave.  
Carteret, NJ 07008

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Sanford Amdur  
Amdur & Friedrich  
E 210, Route 4, P.O. Box 752  
Paramus, NJ 07652

AND

Bruce F. Minkoff  
W. Robert Rubin & Co.  
60 E. 42nd St.  
New York, NY 10165  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
BEN S. LOEB, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Fiscal Years	:	
Ending November 30, 1977 and November 30, 1978.	:	

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Petitioner, Ben S. Loeb, Inc., 1100 Milik Avenue, Carteret, New Jersey 07008, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending November 30, 1977 and November 30, 1978 (File No. 32655).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1983 at 11:30 A.M., with all briefs to be submitted on or before July 15, 1983. Petitioner appeared by Amdur & Friedrich (Sanford Amdur, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel).

#### ISSUES

I. Whether petitioner had a regular place of business outside of New York State and could therefore allocate its income pursuant to section 210.3 of the Tax Law.

II. Whether petitioner may prorate its business receipts on the basis of the number of months that it purported to be doing business in New York.

FINDINGS OF FACT

1. Petitioner filed a New York State Corporation Franchise Tax Report for the period December 1, 1976 through November 30, 1977, listing its address as 1235 Morris Avenue, Union, New Jersey. On this report, petitioner reported entire net income of \$174,532.00. This amount was multiplied by petitioner's reported allocation percentage of 40.71 percent, resulting in reported taxable net income of \$71,052.00.

2. Petitioner filed a final New York State Corporation Franchise Tax Report for the period December 1, 1977 through November 30, 1978, listing its address as 460 Hillside Avenue, Hillside, New Jersey. Petitioner reported its entire net income for the full fiscal year as \$108,369.00. However, petitioner prorated this amount by 4/12ths, representing the first four months of the fiscal year, resulting in entire net income of \$36,123.00. This amount was then multiplied by petitioner's reported allocation percentage of 34.9005 percent, resulting in a taxable net income of \$12,607.00.

3. On November 20, 1980, the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of corporation franchise tax for the fiscal year ended November 30, 1977 in the amount of \$10,348.00, plus interest of \$2,455.00 for a balance due of \$12,803.00. The amount of tax allegedly due was determined by applying an allocation percentage of one hundred percent to petitioner's reported entire net income. The amount of tax due was then reduced by the amount of tax previously reported.

4. On November 20, 1980, the Audit Division also issued a Notice of Deficiency to petitioner for the fiscal year ended November 30, 1978. The Notice asserted a deficiency of corporation franchise tax in the amount of \$9,576.00, plus interest in the amount of \$1,457.89, for a balance due of

\$11,033.89. The asserted deficiency was computed by eliminating the monthly proration described in Finding of Fact "2" and then allocating to New York petitioner's entire net income as reported. The amount of tax due was then reduced by the amount of tax previously reported.

5. Petitioner's business consisted of selling premiums to banks. The banks, in turn, gave the premiums to customers who opened new accounts. Petitioner also supplied industrial premiums which consisted of shirts and hats imprinted with the customer's corporate name and logo.

6. Prior to and during 1973, petitioner's business address was 3701 Henry Hudson Parkway, Riverdale, New York.

7. On May 30, 1974, petitioner executed a three year lease commencing August 1, 1974 for the rental of certain premises located at 1235 Morris Avenue, Union, New Jersey. The lease provided that petitioner was to pay an initial annual rental of \$9,300.00 with increases of \$600.00 per annum. On June 1, 1977, petitioner executed a new three-year lease for the existing premises plus additional space. The rental under the new lease was \$18,000.00 per annum. Furthermore, petitioner was to be responsible for fifty percent of any increase in real estate taxes. According to a footnote in a financial report, the subsequent lease was "settled" during 1979 for an additional payment of \$16,000.00.

8. On February 9, 1978, petitioner executed a six-year lease commencing April 1, 1978 for the rental of approximately 17,000 square feet for warehousing, distribution, storage and general office space at 460 Hillside Avenue, Hillside, New Jersey. The minimum annual rental for the first two years was \$29,750.00. The minimum annual rental for the third and fourth years was \$30,600.00 and the minimum annual rental for the fifth and sixth years of the lease was \$31,450.00.

In addition, petitioner was responsible for 13.5 percent of any increase in real estate taxes on the demised premises.

9. At the beginning of 1977, petitioner's inventory was stored in a public warehouse in New York. During 1977, petitioner began storing inventory in a warehouse located in Bayonne, New Jersey. In or about March, 1978, petitioner began storing its inventory at its premises in Hillside, New Jersey.

10. On or about March 30, 1978, a New Jersey corporation named Ben S. Loeb, Inc. was formed. On the same day, the New York corporation Ben S. Loeb, Inc. transferred its assets to the New Jersey corporation.<sup>1</sup> As a result of this transaction, the New York corporation remained as a shell. The principals decided not to dissolve the New York corporation in order to protect the corporate name and in order to be able to maintain a lawsuit in the State of New York.

11. During the fiscal years in issue, petitioner did not employ any individuals at any facility outside the State of New Jersey.

12. Petitioner's bookkeeper maintained an analysis based upon each invoice showing where goods were shipped. The analysis recorded, in four categories, the destination of the goods. The four categories were: New York City; New York State other than New York City; New Jersey; and elsewhere.

13. Petitioner filed a State of New Jersey Corporation Business Tax Return for the fiscal year ended November 30, 1977. Petitioner listed its address as 1235 Morris Avenue, Union, New Jersey on this return. The return stated that petitioner had a warehouse in New York City. Petitioner allocated 49.56

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<sup>1</sup> Petitioner characterized their transaction as a "merger". It was not a merger within the meaning of section 907 of the Business Corporation Law, however, as both corporations survived.

percent of its adjusted net income to New Jersey. This allocation factor was based on the following:

New Jersey percentage of real and tangible personal property owned	36.03%
New Jersey percentage of total receipts	12.64%
New Jersey percentage of wages, salaries, etc.	100.00%

It also reported that five persons were employed in New Jersey and none outside New Jersey.

14. Petitioner also filed a State of New Jersey Corporation Business Tax Return for the fiscal year ended November 30, 1978. Petitioner listed its address as 460 Hillside Avenue, Hillside, New Jersey. On this return, petitioner allocated 73.5989 percent of its adjusted net income to New Jersey. This allocation factor was based on the following:

New Jersey percentage of tangible real and personal properly owned	100.00%
New Jersey percentage of total receipts	20.7967%
New Jersey percentage of wages, salaries, etc.	100.00%

It also reported that ten persons were employed in New Jersey and none outside of New Jersey.

#### CONCLUSIONS OF LAW

A. That, during the periods in issue, Tax Law §210.3(a)(4) provided that a taxpayer was required to maintain a regular place of business outside of New York in order to allocate its business income.

B. That the regulations which were in effect during the periods in issue provided that "[a] regular place of business is any bona fide office (other than a statutory office), factory, warehouse or other space which is regularly used by the taxpayer in carrying on its business." [20 NYCRR 4-2.2(b)].

C. That petitioner had a bona fide office outside of New York during both fiscal years in issue which it regularly used in carrying on its business. Therefore, petitioner was entitled to allocate its business income during both fiscal years.

D. That as noted in Finding of Fact "10", the New York corporation survived the transaction which took place on or about March 30, 1978. In the absence of evidence to the contrary, it is presumed that the New York Corporation of Ben S. Loeb, Inc. was in existence during the entire fiscal year 1978 (Richardson on Evidence §74 [10th ed. Prince]). Accordingly, the Audit Division properly concluded that petitioner was not entitled to prorate its business income on the basis of the four month period noted in Finding of Fact "2" (see 20 NYCRR 2-3.1).

E. That the petition of Ben S. Loeb, Inc. is granted only to the extent of Conclusion of Law "C" and the Audit Division is directed to recompute the deficiencies or refunds accordingly. The petition is, in all other respects, denied.

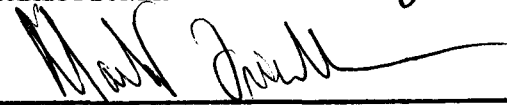
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER